SCHNAPF LLC

MEMORANDUM

TO: Kenneth von Schaumburg

FROM: Larry Schnapf

DATE: August 28, 2012

Dear Ken:

As a follow-up to our telephone call, I have listed below some ideas I have about reforming EPA's remedial programs. The ideas are not listed in order or importance. If control of Congress changes, we might want to convert some of these to legislative proposals.

1. **CERCLA Continuing Obligations Guidance**- The 2002 amendments to CERCLA added the Bona Fide Prospective Purchaser (BFPP) and Contiguous Property Owner defenses. These defenses (in particular the BFPP defense) were enacted to help incentivize purchasers to acquire and remediate contaminated properties so they can be put back into productive use. While EPA promulgated an all appropriate inquiries (AAI) rule to help define the pre-acquisition obligations necessary to be able to assert these defenses, there is little guidance from EPA on how property owners or operators may satisfy their "appropriate care" or "continuing obligations" so they can maintain their liability protection after taking title or possession of property. The 2003 "Common Elements Guidance" is inadequate. The lack of guidance and recent caselaw have created uncertainty for developers and undermined the value of these defenses. EPA should issue detailed guidance on what constitutes appropriate care. Developers and property owners should not have to rely on ASTM to provide guidance on how to comply with their legal obligations.

2. **Revise "Enforcement Discretion Guidance Regarding the Affiliation Language of CERCLA's Bona Fide Prospective Purchaser and Contiguous Property Owner Liability Protections"** – This memo did not sufficiently address concerns raised by the Ashley decision that purchasers of contaminated property could lose their eligibility for the BFPP by agreeing to indemnify sellers.

3. **More Robust Use of PPAs and CPO "Assurance Letters"-** With the passage of the 2002 CERCLA amendments, EPA announced in guidance that it would issue PPAs or CPO assurance letters only in rare instances because the landowner liability protections were self-implementing. However, these agreements can be incredibly valuable. EPA

should urge its regional offices to issue such documents where they can facilitate redevelopment such as in urban superfund sites (e.g., Gowanus Canal, Newtown Creek) and where municipal governments are willing to foreclose on contaminated properties and then convey title to redevelopers.

4. **Clarify Scope of Municipal Liability Protections Under CERCLA to Encourage Taking Title of Vacant Properties and Facilitate Reuse-** There is considerable uncertainty among local government community if municipalities can invoke the protections of 42 U.S.C. 9601(20)(D) and (9601(35)(A)(ii) where they take title in lieu of formal tax foreclosure proceeding since this may not be "involuntary". Local governments might be more willing to take title and assemble vacant properties so they would become more attractive to redevelopment if they could obtain clarity on the scope of this protection. Presumably, a purchaser from a municipality would then be able to assert the BFPP or third party defense. A related problem is that the BFPP defense would not apply to local governments who took title prior to January 11, 2002. If control of Congress changes, this can be legislative proposal.

5. **Revise Status of Tenants of Brownfield Sites-** EPA's guidance "*Enforcement Discretion Guidance Regarding the Applicability of the Bona Fide Prospective Purchaser Definition in CERCLA Section 101(40) to Tenants: Frequently Asked Questions"* indicated tenant status was derivative of the owner so that if owner lost BFPP status, tenant could lose status as well. While EPA said it would exercise its enforcement discretion, this still creates uncertainty. I do not see any reason why EPA could not interpret the scope of the BFPP to apply to tenants in their own right. If control of Congress changes, this can be legislative proposal.

6. **Reform EPA Remedial Programs Into a Single Unified Cleanup Program- Our** nation's remedial programs were created as we became aware of new concerns. This has resulted in different cleanup standards and procedures. We have separate staffs for CERCLA, RCRA, TSCA (PCBs), USTs, etc. We now have three decades of experience remediating sites. I think we should strongly consider combining these discrete offices into one streamlined remedial office that will provide consistent regulatory approach and reduce unnecessary staff.

7. **Clarify Lender Obligations Following Foreclosure-** The original EPA lender liability rule contained a "bright-line" test for lenders to follow so they can be deemed to have taken commercially reasonable steps to sell property following foreclosure, thereby staying within the safe harbor created by the secured creditor exemption. Unfortunately, when the rule was vacated and the 1996 lender liability amendments were added to CERCLA, the "bright line" test was omitted. So lenders have no guidance on how to proceed during what is the worst economic downturn since the Great Depression. Can they reject an offer that is equal to artificially depressed price? How long can they hold onto property without losing protection? Some states allow for two years while others allow up to five years to sell the property. Greater clarity will help lenders move these properties. If control of Congress changes, this can be legislative proposal.

8. **Encourage States to Adopt Licensed Professional Programs-** States are facing severe staffing constraints which are creating backlogs in site remediation. Seems to me EPA could use its authority under section 128 of CERCLA (approval of state response programs) as well as its RCRA delegation authority to have states adopt licensed site professional programs like MA, NJ and CT so that states could devote their limited resources to the sites that pose the greatest risk to human health and the environment. EPA could establish a national licensing program for consultants that sets forth minimum professional requirements and states could adopt these programs as part of their remedial programs. One way to accomplish this could be by amending the All Appropriate Inquiries (AAI) Rule to revise the definition of Environmental Professional. This could avoid having to promulgate a new regulation. If control of Congress changes, this can be legislative proposal.

9. **Revise NCP-** revising the NCP. It was last revised in 1990. Since then we've learned a lot about cleanup and have lots of informal guidance to help streamline the process and make it more cost-effective. Doesn't make sense to continue to follow the RI/FS lockstep process. Why review five alternatives? In NY, we have a proposed remedy and an unrestricted cleanup alternative and are able to generate robust cleanups. If we can incorporate these innovations in the NCP, we will be able to get faster cleanups that are more cost-effective while preserving right of contribution. Right now, firms are incentivized to follow the lock-step approach to preserve their ability to pursue cost recovery..

10. **Revise CERCLA Disclosure Requirements With Amnesty Program To Incentivize Accelerated Cleanups-** Property owners are not currently required to disclose historic contamination. As a result, many sites remain unremediated until the owner is ready to sell the property. To help accelerate cleanups, I think EPA could announce it was going to change its disclosure rules from reportable quantity approach to contaminant concentrations and at the same time provide current property owners a one year amnesty period to voluntarily disclose contamination. Much like the EPA audit policy, owners who disclose the existence of contamination that they are not responsible for would be afforded BFPP status. They would have to exercise "appropriate care" but not full cleanup. The SARA Title III program resulted in substantial reductions in pollution. It seems worth the try to experiment with an amnesty period for contaminated sites.

11. **Limit Brownfield Grants To Sites With No Identified RPs-** EPA has been granting brownfield grants to local governments without considering if there is a responsible party that could be incentivized to participate in a cleanup. Before EPA gives away public money, it should make a determination that there are no responsible parties. Brownfield funds should be limited to those sites that are truly orphans (i.e., the responsible party is defunct).

12. **Move Away from Brownfield Grants/Loans and To Tax Credits-** The brownfield financial incentives are becoming public works projects. The funding often takes too long for private development. Rather than giving funds to local government to investigate and reuse planning, we can incentivize the private market to do this work by expanding and extending brownfield tax credits. The New York Brownfield tax credit program has resulted in an estimated $7.5B in investment in the state at a cost of $750MM. Tax credits put the upfront risk on the developer instead of the taxpayers.

13. **Require States To Use Parceling To Encourage RCRA Brownfields-** EPA RCRA Brownfield Reforms urged states to allow owners or operators of TSDF to sell off clean parcels of their facilities (e.g., portions never used for any waste management) while the HWMUs or SWMUs were undergoing corrective action. EPA should more forcefully use its delegation authority to allow this much needed reform.

14. **Clarify RCRA liability for Generator-only sites-** There is much confusion if closure obligations for a generator site run with the land. In other words, a site may have been owner or operated by a defunct generator. A prospective purchaser is interested in redevelopment but is concerned it will become subject to closure obligations for the areas where wastes were managed. Presumably, generator sites could be treated as any brownfield site without the need to undergo formal RCRA closure.

15. **Add Landowner Liability Protections to TSCA for PCB Cleanups-** Purchasers often take steps to qualify for CERCLA BFPP only to learn after taking title that the property has been impacted with PCBs and they are subject to TSCA cleanup. This might require Congressional action but I do not see any reason why TSCA should not have a BFPP defense. After all, Congress added AAI and BFPP to OPA in 2004 with little controversy.

16. **TSCA PCB Reform- T**he PCB cleanup and disposal rules are a bit RCRA-like, a bit CERCLA-like and not well integrated. The cleanup should also not depend on the original spill concentration but on current concentrations and media. I'd like to see the entire Subpart D to 40 CFR 761 repealed, and disposal of PCB-containing material handled entirely within RCRA via the listed-waste and LDR route.

17. **Adopt National Environmental "WARN" Obligations Under RCRA-** to prevent future brownfields, companies closing operations should be required to notify relevant permitting authority at least 90 days in advance of closing to ensure that appropriate closure occurs so that public money does not have to be used to address cleanup or local government seeks brownfield funds.

18. **Adopt Restatement (Third) of Torts Approach to Joint Liability-** When CERCLA was enacted, Congress said that liability should be premised on evolving concepts of common law. At the time of its enactment, the Second Restatement was in effect which favored use of joint liability for indivisible harm. However, this was before states began adopting comparative negligence statutes. The Third Restatement states that the law has shifted dramatically from the use of joint liability and that courts should try to find a basis for apportioning liability where there is a reasonable basis. Despite the publication

of the Third Restatement in 2000, federal courts continue to cling to the doctrine espoused by the Second Restatement. As recently as last month, an appeals court declined to adopt the suggestion of an amicus brief submitted by The American Tort Reform Association to use the Third Restatement to apportion liability for the Fox River cleanup. My post on this case is at: http://www.environmental-law.net/2012/08/7th-circuit-declines-to-apply-third-restatement-of-torts-in-apportionment-case/ . If control of Congress changes, we might want to have Congress clarify that CERCLA liability should be based on the Third Restatement. If control does not change, perhaps EPA could issue interpretative guidance that it now considers the Third Restatement to be the governing law for CERCLA liability. This is obviously very controversial but it would reflect the Congressional intent to follow the evolving common law. Others might not like the trend but this is the direction where the law has moved.